UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING FERRIS INDUSTRIES OF CALIFORNIA, INC. d/b/a BFI NEWBY ISLAND RECYCLERY AND FPR-II, LLC d/b/a LEADPOINT BUSINESS SERVICES, A JOINT EMPLOYER

and **Case 32-CA-160759**
32-RC-109684

SANITARY TRUCK DRIVERS AND HELPERS LOCAL 350, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.'S STATEMENT OF POSITION IN RESPONSE TO THE REMAND OF THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

We represent Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery ("BFI") in the above-referenced matter. We submit the following statement of position in response to the Board's February 22, 2019 invitation.[1] Based upon the record, and for the reasons described below, the R case should be dismissed, along with the accompanying test-of-certification C case.

As Chairman Ring noted in his January 17, 2019 response to Members of Congress regarding joint employer rulemaking, p. 3, the Board "is not compelled to adopt the court's position as its own … in *Browning-Ferris* itself[.]" Indeed, the Court did not pronounce a joint employer standard to be followed in this case, but left the determination to the Board consistent with the Court's opinion.

I. THE BOARD SHOULD DISMISS THE CASES UNDER THE PRE *BROWNING-FERRIS* JOINT EMPLOYER STANDARD BECAUSE APPLYING A REFORMULATED TEST TO BFI IS INEQUITABLE

As the District of Columbia Circuit noted, the *Browning-Ferris* dissent "expressed concern that retroactive application of the new aspects of the test would disrupt the longstanding expectations of parties who had structured their labor relationships based on the Board's previous joint-employer standard." *Browning-Ferris Indus. Of Cal. v. NLRB*, 911 F.3d 1195, 1205 (D.C. Cir. 2018) (citing 362 NLRB No. 186 (2014) at 22-23).

The Court cautioned that:

> [i]n rearticulating its joint-employer test on remand, then, the Board should keep in mind that while retroactive application may be 'appropriate for new applications of [existing] law,' it may be unwarranted or unjust 'when there is a substitution of new law for old law that was reasonably clear,' and on which employers may have relied

[1] BFI incorporates by reference its earlier filings before the Board and the District of Columbia Circuit in this matter. BFI reasserts its arguments and citations to the record in those submissions, and urges the Board to adopt them here as further establishing why dismissal of the cases is warranted. Counsel for the General Counsel's Statement of Position in Response to the Remand of the D.C. Circuit is cited as "GC SOP."

> in organizing their business relationships. *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (alteration in original; internal quotation marks omitted) (quoting *Public Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)); *cf. American Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 333–334 (D.C. Cir. 2016) (finding retroactive application 'not manifestly unjust' where the agency's previous rulings 'reflect[ed] a highly fact-specific, case-by-case style of adjudication' that did not establish 'a clear rule of law exempting' certain conduct).

Id. at 1222.

Because any reformulation of the Board's joint employer test abandons the decades-old standard in effect when BFI and Leadpoint established their relationship in 2009 and administered it for years thereafter, it is manifestly unjust to apply a different test to BFI here. Counsel for the General Counsel's acknowledgment of the Board *Browning-Ferris* standard's "after-the-fact assessment of every aspect of a business relationship between two entities" and "lack of concern for the real-world consequences of these changes," GC SOP p. 13, underscores the inequity of doing so. Doing so would ignore the Supreme Court's admonition that those living with agency pronouncements must receive "fair warning" of their change. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 132 S. Ct. 2156, 2167 (2012). The pre *Browning-Ferris* standard gave contracting parties -- such as BFI and Leadpoint -- a comprehensible statement of its boundaries, so they could predictably create the arrangements they desired.

At the time of the 2013 election petition, nearly 30 years of Board authority held that substantial direct and immediate control of essential employment terms was necessary to create a joint employer relationship. Indirect and reserved control -- however articulated -- was accorded no meaningful weight regardless of the particular facts.

The Regional Director had little difficulty finding that BFI was not a joint employer under the pre-*Browning-Ferris* standard. Distilling the record evidence at 362 NLRB at 1634, the *Browning-Ferris* dissent emphasizes that "the Regional Director correctly decided under extant law that it was not enough to show BFI was the joint employer of Leadpoint employees." *Id.*

The dissent points out that "the majority does not argue that the Regional Director erred in making this finding." *Id.* n. 60. Moreover, as discussed below, the Court's description of the common law "lines" of indirect and reserved control renders irrelevant most of the evidence relied upon by the *Browning-Ferris* majority and summarized on p. 1634 of the dissent.

The Board should reach a conclusion similar to those of the Regional Director and the *Browning-Ferris* dissenters and dismiss the cases on a pre *Browning-Ferris* analysis. Such an outcome also is sensible policy by avoiding creation of a separate strand of doctrine as the Board transitions to its joint employer rulemaking.

II. ALTERNATIVELY, THE BOARD SHOULD DISMISS THE CASES ON A STANDARD SIMILAR TO THE ANTICIPATED FINAL JOINT EMPLOYER RULE, OR BY APPLYING THE RULE ITSELF

Alternatively, the Board should dismiss the cases on a standard similar to the anticipated final joint employer rule, or by applying the rule itself. Such approaches prudently would align the Board's treatments of the law in this area.

The proposed joint employer rule provides:

> An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. *A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.*

83 FR 46681 (September 14, 2018) (emphasis supplied).

If such a control formulation is adopted as part of the final rule, BFI is not a joint employer based upon the record evidence. As the relevant control factors in the proposed final rule would be "bounded by the common-law's definition of a joint employer [and] … color within the common-law lines identified by the judiciary," 911 F.3d at 1208, applying it here would be consistent with the Court's remand. The District of Columbia Circuit did not mandate a particular

joint employer standard, nor purport to dictate how control factors must be weighed. Nor did the Court require that the Board establish a standard incorporating the maximum permissible boundaries of common law control. [2]

Rather, so long as the Board acts "within" the common law "lines," it is free to recognize other labor law and agency policy considerations -- from vindicating Section 8(b)(4) secondary boycott protections, to simply producing a workable test. *See, e.g.,* GC SOP, pp. 8-16. Accordingly, similar to declining retroactive application of a revised joint employer standard, applying a standard here that mirrors the anticipated final rule would be an exercise of "reasoned decision-making" by the Board. *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 372 (1998) (citation omitted).

Indeed, as explained by Judge Randolph in his dissent, directly applying the final rule itself in this case (if it is akin to the pre *Browning-Ferris* standard) is allowed to the Board:

> [T]he Board's application of its proposed rule to Browning-Ferris would not amount to retroactive law giving. Applying the Board's new rule would be reinstating the legal regime existing before the Board's decision in this case discarded it. The upshot is that if the Board applied its proposed 'new' rule – actually the old rule – to Browning-Ferris on remand the Board would not be impermissibly attaching 'new legal consequences to events completed before [the rule's] enactment.' *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994). Our decision in *Catholic Health Initiatives* is on point. We held that a rulemaking applying a rule codifying a policy announced in an earlier adjudication did not violate the rule against retroactive rulemaking. 718 F.3d at 920–22.

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[2] Thus, it should be recognized that even if, *arguendo*, the Court in dictum "seemed to require the Board to establish a joint employer *rule* that conforms to the D.C. Circuit's interpretation of the common law," GC SOP p. 7 n. 3 (citation omitted) (emphasis in original), it did not impose any common law formulation. Rather, the Court delineated what it found to be common law "lines," but did not direct that the Board "color" to the boundaries of the common law control factors which "can" -- not must -- be considered. Nor did the Court purport to prohibit the Board from accounting for the Act's other relevant policy concerns in fashioning its ultimate joint employer rule, or any test through case adjudication.

911 F.3d at 1226. A direct application of such a final rule also would warrant dismissal of the cases.

III. BFI IS NOT A JOINT EMPLOYER UNDER ANY COMMON LAW ANALYSIS CONSISTENT WITH THE COURT'S REMAND

Even if the Board were to apply a reformulation of the *Browning-Ferris* test consistent with the Court's remand that differs from the anticipated final joint employer rule, BFI is not a common law joint employer under any such analysis. This would be so were the Board to return to the pre *Browning-Ferris* standard apart from its rulemaking, as Counsel for the General Counsel urges. *See* GC SOP, p. 2. The cases should be dismissed on such a basis as well.

A. The District of Columbia Circuit's Holdings Regarding Common Law Joint Employment And Its Remand

As an initial matter, the Court's holdings regarding common law joint employment and its remand should be recounted:

- The Act "provides no relevant definition of 'employer,' let alone of 'joint employer.'" 911 F.3d at 1200
- The Board "can" consider a "right-to-control" essential employment terms and conditions as part of its joint employer standard. *Id.* at 1199, 1209. The Court did not require that the Board do so, nor purported to assign any particular weight to reserved control evidence.
- The Court's description of what reserved control entails was focused on control over details of worker performance. *Id.* at 1209-1212 and footnotes (retention in directing the manner of "how it should be done;" "retain[ing] the right to direct the manner in which the business shall be done;" directing "manner in which the work was done;" right to control "physical conduct of [another] in the performance of a service; "right to control physical details as to the manner of performance") (citation omitted).

- The Board "can" consider indirect control -- properly understood -- over essential employment terms and conditions as part of its joint employer standard. Slip op. *Id.* at 1199, 1209, 1216-1219. The Court did not require that the Board do so, nor mandate any particular weight be given to indirect control evidence.

- "[I]n failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting, the Board overshot the common-law mark." *Id.* at 1216.

- "[E]specially insofar as indirect control means control exercised 'through an intermediary'" over essential employment terms, it may be recognized as a factor. "In particular, the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship." *Id.* at 1217. *See also id.* at 1219 ("If, for example, a company entered into a contract with Leadpoint under which that company made *all of the decisions about work and working conditions, day in and day out, with Leadpoint supervisors reduced to ferrying orders from the company's supervisors to the workers*, the Board could sensibly conclude that the company is a joint employer. This is especially so if that company retains the authority to step in and exercise direct authority any time the company's indirect mandates are not followed.") (emphasis supplied). As discussed below, such a scenario does not reflect BFI's and Leadpoint's relationship.[3]

[3] Thus, the Board should make clear that to the extent "indirect" or "reserved" control even are capable of being recognized as control factors, they must be understood as embodying a specific right to displace a contractor and directly control its employees or their essential employment terms -- not merely exert economic influence over a business which retains actual, discretionary, and ultimate day-to-day control over its own workers. *See also Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322, 1327 (D.C. Cir. 1971) (finding "reserved" control means that the putative employer has the right to displace the primary employer, *i.e.*, "may intervene in the control of an employee's performance"). As Chairman Ring pointed out in his

- As mentioned above, the Court did not mandate any particular formulation of a joint employer standard, or hold that the one adopted by the Board in *Browning-Ferris* is required by the Act. Nor did the Court purport to dictate how permissible control factors should be weighted. Rather, the Board may exercise its "policy expertise" in fashioning and applying a joint employer test "bounded by the common-law's definition of a joint employer. The Board […] must *color within the common-law lines identified by the judiciary*." *Id.* at 1208 (emphasis supplied). Accordingly, the Board is not required to implement a standard that colors to the very limit of those lines.

- "The problem with the Board's decision is not its recognition that indirect control (and certainly control exercised through an intermediary) can be a relevant consideration in the joint-employer analysis. *It is the Board's failure when applying that factor in this case to hew to the relevant common-law boundaries that prevent the Board from trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts*. To inform the joint-employer analysis, the relevant forms of indirect control must be those that "share or co-determine those matters governing essential terms and conditions of employment." … *By contrast, those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status. The Board's analysis of the factual record in this case failed to differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships*." *Id.* at 1219-1220 (emphasis supplied).

January 17, 2019 letter to Members of Congress, p. 4, what the Court considered to be relevant "indirect" control, the proposed joint employer rule would characterize as a form of direct control.

- Among the other factors the Court found to be irrelevant to a joint employer analysis: (i) "Browning-Ferris's and Leadpoint's use of a 'cost-plus contract,' a frequent feature of third-party contracting and sub-contracting relationships;" (ii) "routine contractual terms, such as a very generalized cap on contract costs, or an advance description of the tasks to be performed under the contract, would seem far too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis; (iii) "'[s]ome such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees;'" (iv) "'global oversight' is a routine feature of independent contracts;" (v) "'co-operation and co-ordination,' [between a service recipient and a contractor's employees] without more;" (vi) "the basic contours of a contracted-for service—such as requiring four lines' worth of sorters plus supporting screen cleaners and housekeepers—would not count under the common law;" (vii) "the routine components of a company-to-company contract." *Id.* at 1220-1221 and footnotes (citations omitted).[4]

[4] The Court also found that cases delineating the boundaries between independent contractor and employment relationships can be instructive to joint employment analysis in that "they elaborate on the nature and extent of control necessary to establish a common-law employment relationship." 911 F.3d at 1215. To this extent, we disagree with Counsel for the General Counsel's suggestion, GC SOP, p. 5 n. 1, that independent contractor cases are "inapplicable" to joint employer analysis. While not governing, as the Court indicates, they illuminate a proper understanding of similar control concepts. In such other cases, the District of Columbia Circuit has found the following additional factors *irrelevant* to such an employer determination: (i) regulating work flow because of business conditions, market forces, or customer demand, *see, e.g.*, *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75-76 (D.C. Cir. 1990) (finding if "the primary operator must slow down, curtail, or fundamentally change its own operation, that is actually no control at all."); (ii) "constraints imposed by customer demands," including monitoring and assessment of whether the contractor's agents are satisfying service goals or agreed-upon performance criteria, *see, e.g.*, *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009) ("'[W]here a company's control over an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship.' Employer efforts to monitor, evaluate, and improve the results of ends of the worker's performance do not make the worker an employee.'")(citation omitted); (iii) policing a service arrangement to ensure the client is appropriately charged, cost control initiatives, tracking contractor worker productivity, reviewing

Accordingly, with respect to the Board's common law joint employment analysis, the Court concluded that "because the Board did not confine its consideration of indirect control consistently with common-law limitations," the case would be remanded to the NLRB for further proceedings consistent with its opinion. *Id.* at 1200. In "applying the indirect-control factor in this case," the Board "failed to confine it to indirect control over the essential terms and conditions of the workers' employment." *Id.* at 1209. The Court "remand[ed] that aspect of the decision to the Board for it to explain and apply its test in a manner that hews to the common law of agency." *Id.* The Court could not "tell from this record what facts proved dispositive in the Board's determination that Browning-Ferris is a joint employer, and [is] concerned that some of them veered beyond the orbit of the common law[.]" *Id.* at 1221.

B. BFI Is Not A Common Law Joint Employer Based Upon The Record Evidence

The *Browning-Ferris* dissenters persuasively capsulized the "sum total" of the control evidence in the record:

> The sum total of this evidence is (1) a few contract provisions that indirectly affect the otherwise unfettered right of Leadpoint (the supplier-employer) to hire its own

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contractor records, and auditing contractor expenses -- including headcount and overtime, *see, e.g.*, *ICWU Local 483 v. NLRB*, 561 F.2d 253, 256-257 (D.C. Cir. 1977), *Aurora Packing Co*., 904 F.2d at 75, *FedEx*, 563 F.3d at 501, *N. Am. Van Lines, Inc. v. NLRB*, 896 F.2d 596, 598-599 (D.C. Cir. 1989), *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am. v. NLRB*, 603 F.2d 862, 873, 891 (D.C. Cir. 1978), *reh'g denied*, 603 F.2d 898, 899, 904 (D.C. Cir. 1979); (iv) establishing minimum qualifications for a contractor's employees prior to their performance, including employment eligibility verification, drug screens, background checks, clean driving records and other forms of safety compliance, and other basic competencies, *see, e.g., N. Am. Van Lines* and *Aurora Packing, supra*; *Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb*, 580 F.2d 496, 505 (D.C. Cir. 1978); (v) satisfying government regulations, legal standards, recognized standards of care, and efforts to otherwise avoid liability risk, *see, e.g. FedEx*, 563 F.3d at 501 (finding "constrains imposed by … government regulations do not determine the employment relationship"), *N. Am. Van Lines*, 896 F.2d at 599 ("employer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the means and manner of performance, do not weigh in favor of employee status."); (vi) the ability to cancel a service contract, including at will, *see, e.g.*, *N. Am. Van Lines, Inc*., 896 F.2d at 598-599, *Local 777*, 603 F.2d at 873, 899, 904.

> employees; (2) reports made by BFI representatives to Leadpoint of two incidents—one where a Leadpoint employee was observed passing a "pint of whiskey" at the jobsite, and another where a Leadpoint employee "destroyed" a drop box— that understandably resulted in discipline; (3) one contractually-established pay rate ceiling restriction for Leadpoint employees (obviously stemming from the cost-plus nature of the contract); (4) BFI's control of its own facility's hours and production lines; (5) a record-keeping requirement for Leadpoint employee hours (again, obviously stemming from the cost-plus nature of the contract); (6) a sole preshift meeting to advise Leadpoint supervisors of what lines will be running and what tasks they are supposed to do on those lines; (7) monitoring of productivity; (8) establishment of one type of generally applicable production assignment scheme for Leadpoint; and (9) 'on occasion,' addressing Leadpoint employees about productivity directly. That is all there is, and the Regional Director correctly decided under extant law that it was not enough to show BFI was the joint employer of Leadpoint employees. The majority's evidence amounts to a collection of general contract terms or business practices that are common to most contracting employers … plus a few extremely limited BFI actions that had some routine impact on Leadpoint employees. It would be hard to find any two entities engaged in an arm's-length contractual relationship involving work performed on the client's premises that lack this type of interaction.

362 NLRB at 1634.

Applying the Court's distinction between control over an employment term -- instead of aspects of a contracted-for service arrangement beyond the scope of joint employment analysis -- it is clear that BFI neither controls nor co-determines any essential employment term. Counsel for the General Counsel agrees, emphasizing that any alleged control by BFI over essential terms and conditions of employment "demonstrates only indirect control that is intrinsic to ordinary third-party contracting relationships." GC SOP, p. 2. Assessing the foregoing evidence by number:

(1) Such provisions relate to the qualifications of the contractor and its agents, as well as maintenance of the safety of the premises. Thus, they are routine components of a contractor relationship and outside the scope of joint employer analysis.

(2) Use of alcohol on a service client's premises and destruction of its property involve harms that do not turn on the employment status of the perpetrator. The investigations and disciplinary outcomes were undertaken and determined by Leadpoint in its discretion.[5]

Moreover, two isolated incidents -- however characterized -- over a multi-year period and involving only two workers out of approximately 240 Leadpoint employees (not including turnover) are too infrequent to establish a control element. They do not remotely rise to the level of interaction depicted by the Court as constituting an indicium of control:

> If, for example, a company entered into a contract with Leadpoint under which that company made *all of the decisions about work and working conditions, day in and day out, with Leadpoint supervisors reduced to ferrying orders from the company's supervisors to the workers.*

911 F.3d at 1219 (emphasis supplied). *See also id.* at 1220 ("'Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees") (citation omitted).

The Court recognizes, *id.* -- as did the Supreme Court in *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 689-690 (1951) -- that even what could be considered "some" limited "supervision" over the other party's employees in administering a service contract does not "make the employees of one the employees of the other."

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[5] In those two incidents, BFI did not exercise control over Leadpoint's workers. Tr. 95:12-23, 129:15-25, 163:17-164:23, 170:16-171:5. There was evidence that a BFI supervisor told a Leadpoint supervisor that he had observed two Leadpoint employees passing a "pint of whiskey" while on the job. Leadpoint made its own decision to discharge one of the employees and re-assign the other one to a different contract, without any input from BFI. RD-6-8; Tr. 57:21-24, 68:14-17, 130:12-134:21, 144:7, 145:6, 168:7-169:5, Tr. 202:18-205:1. On the other occasion, a BFI supervisor told Leadpoint management that he had seen a Leadpoint employee on surveillance video damaging BFI's property (*i.e.*, "destroyed" a drop box). Leadpoint conducted an investigation and ultimately decided to terminate the employee, again without BFI's input. Tr. 198:4-200:13. (RD refers to the Regional Director's decision. Tr. is the transcript in the R hearing. LP Exhs, referenced below, are Leadpoint's exhibits in that hearing.)

It also bears emphasizing that the Board's bottom line inquiry in an R case is whether an appropriate bargaining unit exists, *i.e.*, whether the petitioned-for employees share a community of interest among themselves. Accordingly, *the Board should give little if any recognition and weight to alleged control factors that are not equally applicable to all of the workers in the proposed bargaining unit.* Here, there is no record evidence that any of the approximately 238 other Leadpoint employees then working at BFI's facility at the time of the petition had similar interactions with BFI. *Consistent with community of interest principles, alleged control factors should be assessed separately as to each worker claimed to be included in a jointly employed bargaining unit.* It may well be that -- based upon lack of common control evidence -- not all of the persons in the petitioned-for unit share a sufficient community of interest.

(3) As the dissent points out, the wage ceiling was attendant to expense controls in a cost-plus arrangement, and the Court found such arrangements irrelevant to joint employment analysis. Leadpoint exclusively determines its individual worker wage rates below the ceiling.

(4) The Court considered a service client's control over its hours and type of operation to be part of the "basic contours of a contracted-for service," and not employment terms.

(5) Such recordkeeping is merely policing the parties' cost-plus arrangement, and not an employment term.

(6) Such a meeting goes to "the basic contours of a contracted-for service" and reflects routine coordination between contracting parties that is part of a service relationship.

(7) This is simply monitoring the parties' cost-plus arrangement to control costs and to ensure agreed-upon productivity ends are being satisfied.

(8) This goes to "the basic contours of a contracted-for service." BFI does not control individual employee work assignments.

(9) BFI did not establish any employment "term" for Leadpoint's employees, and is not giving instruction that subjects them to discipline by BFI. Moreover, as noted above, any such isolated encounters were too infrequent to potentially give rise to a control element.[6]

Counsel for the General Counsel agrees that "[t]he evidence in the R-case did not demonstrate that BFI possessed sufficient control over the essential terms and conditions of Leadpoint's employees, but instead only indirect control that is intrinsic to ordinary third-party contracting relationships." GC SOP, p. 24. Although Counsel for the General Counsel found the relevant points of evidence to be somewhat different than how the Board *Browning-Ferris* dissenters characterized them, *id.*, pp. 24-30, the result is the same.

Thus, Counsel for the General Counsel concludes that the evidence relied upon by the Board majority boils down to: (1) "common contractual and operational requirements intended to ensure a safe and efficient workplace for the temporary supplemental workforce, while limiting to routine matters BFI's intrusion into the employment relationship between Leadpoint and its employees[;]" (2) "in general, BFI directly controls its own work processes and monitors its use of Leadpoint's services and personnel, which may indirectly have limited and routine impact on Leadpoint's employees[;]" and (3) "while BFI and Leadpoint may jointly determine the relationship between the two companies, including competition between them as to compensation,

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[6] The record evidence is limited to: (i) one sorter asserting that she had seen a BFI supervisor instruct a Leadpoint employee "a couple times" over a two-to-three year period; and (ii) another Leadpoint worker recalling that a BFI supervisor once reminded Leadpoint employees to keep their work areas clean but to not use their break time cleaning up the sorting area. Tr. 273:10-18, 283:1-285:10, 296:2-22. As with (2) above, even if accepted as true, such interactions are far too infrequent to establish a control element. Further, they involve only a small fraction of the petitioned-for unit, *i.e.*, they do nothing to show a community of interest among the workers as a whole.

it is Leadpoint alone that directly controls and administers the wages and benefits given to its own employees." GC SOP, pp. 24-26.

Such evidence does not establish a sufficient quantum of control by BFI over Leadpoint's employees' essential employment terms and working conditions. Rather, as Counsel for the General Counsel would have the Board find: "[T]he sum total of this evidence amounts to a collection of general contract terms or business practices that are common to most contracting employers, plus a few limited and routine BFI actions that had only minor impact on Leadpoint employees. It would be difficult to find any two entities engaged in an arm's-length contractual relationship involving work performed on the client's premises that lack this type of interaction, and it is not sufficient to establish joint-employer status."[7] *Id.*, p. 26.

As a result of the Court's decision, the Board majority's appraisal of the common law control evidence cannot stand -- the Board must reconsider the evidence *ab initio*. As the majority's evaluation is premised upon a multi-factor, totality-of-the-circumstances approach, explicitly relies (362 NLRB at 1616-1618) on numerous factors rendered irrelevant by the Court's analysis[8], and never indicates how various control elements are to be weighed (or what evidence

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[7] Accordingly, the evidence noted by Counsel for the General Counsel includes items reflecting contractor and contractor agent qualifications ((1)(A)-(D)); safety and premises liability concerns ((1)(B)); cost controls within a cost-plus structure ((2)(B),(D), (3)); performance ends and the parameters of when contractor performance is sought in relation to BFI's overall facility operations ((2)(A)-(C)).

[8] Those factors relied upon by the Board majority made categorically irrelevant by the Court include: (i) the service agreement being terminable at will; (ii) BFI's pre-performance qualifications of Leadpoint and its agents; (iii) the majority's misconception of what constitutes "control" (as opposed to what is attendant to an ordinary contractor relationship) over Leadpoint employee discipline and other terms; (iv) BFI's control over the speed of sorting streams, which has an impact on operations outside of the scope of the service agreement; (v) cost containment measures such as overtime limitations, staffing numbers, recordkeeping and other cost ceilings in a cost-plus contract; (vi) deciding where services are to be performed; and (vii) deciding when its facility will be open and when services are to be performed. 362 NLRB at 1616-1618.

is sufficient to support a joint employer finding), its assessment is fatally infected. Presumably, if the Court thought the Board majority's joint employer determination were salvageable based upon the state of the record, it would not have remanded the case.

The reality is the record evidence establishes that Leadpoint -- through its own on-site management team and its human resources personnel -- *has direct, immediate, and exclusive control* over every employment term which conceivably is "essential": worker recruiting, applicant screening, hiring, training, supervising, scheduling, assigning job duties, compensating, allocating overtime, benefits administration (under Leadpoint's own benefit plans), employment policies, safety compliance, counseling, promoting, disciplining and terminating of its employees.[9] RD-2-12; Tr. 18:11, 12, 18:25-20:10, 20:25-23:10, 23:25-28:5, 26:9-28:3, 28:20-29:1, 30:4-9, 30:13-24, 35:20-36:4, 49:3-7, 67:19-21, 73:17-19, 75:11-19, 76:7-80:6, 78:10-13, 78:19-21, 79:3-5, 80:16-81:2, 86:1-23, 88:20-25, 93:22-96:25, 98:2-16, 99:11-25, 100:23-101:10, 123:18-20, 126:9-127:15, 129:12-130:3, 139:11-13,141:12-20, 141:23-142:8, 150:9-12, 158:11¬159:1, 159:20-160:24, 161:22-162:16, 162:24-163:1, 163:17-164:23, 171:14-172:8, 175:24 - 176:8, 189:20-24, 190:6-11, 191:10-21, 192:14-197:19, 200:17-202:11, 211:21-212:3, 213:20-214:12, 214:25-215:4, 267:15-268:11, 289:2-10, 301:2, LP Exhs. 1, 2(a)-(d).[10]

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[9] BFI and Leadpoint collaborate on communicating general work and premises safety requirements consistent with Occupational Health and Safety Administration (OSHA) guidelines which encourage such collaboration at multi-employer worksites. *See* Recommended Practices, available at https:// www.osha.gov/ Publications/ OSHA3735.pdf. Tr. 65:2-6. The District of Columbia Circuit finds such collaboration and cooperation -- especially as to compliance with government standards and standards of care for visitors to premises that do not turn on employment status -- to not be evidence of a joint employer relationship. 911 F.3d at 1220 n. 14. *See also* n. 3 *supra*. Further, generally, joint employer analysis cannot be premised upon control factors that do not turn on whether a person is an employee, *e.g.*, safety or premises liability considerations applicable to any visitor to the property where work is performed.

[10] We agree with Counsel for the General Counsel's contentions that: (1) "provisions in a contractual agreement between two business entities that provide for the employment terms of one of the entities' employees do not in and of themselves indicate the joint possession of control over

C. Even If BFI Possesses Some "Control" Over Any Essential Employment Term, It Would Be Insufficient To Create A Joint Employment Relationship

The foregoing record evidence shows that BFI does not possess what the District of Columbia Circuit would recognize as "control" over any "essential" employment term -- as opposed to what the Court properly understands to instead involve the contours of a service relationship.

Indeed, even if *any* of the Board *Browning-Ferris* majority's nine (9) evidentiary points highlighted by the dissent could constitute some "control" over such an employment term, it plainly would be insufficient to then create a joint employer relationship under the Act.

As noted above, the Court did not require the Board find a joint employment relationship based upon the smallest possible quantum of anything within the range of what can be considered relevant common law "control." Nor did the Court purport to dictate to the Board how to weigh potentially cognizable control factors (*e.g.*, direct, indirect, reserved) in relation to each other, or in consideration of other provisions and policies of the Act. The Court told the Board that it must "color within the common-law lines identified by the judiciary." The Court decidedly did *not* say that the Board is obligated to color out to the boundaries of those lines if it has other appropriate reasons not to do so.

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such terms and conditions of employment[;]" and "for an entity to be deemed a joint employer subject to a bargaining obligation or for vicarious liability for a co-employer's violation of a bargaining obligation, that entity must control *all* essential terms and conditions of employment factors. Basing a determination of joint employer on control of a single term and condition of employment would certainly be inconsistent with the weight of authority and prior Board law." GC SOP, pp. 19-20 (citations omitted) (emphasis in original).

1. The Board Should Hold That "Pervasive" Control Is Required To Form A Joint Employer Relationship

The Court found that cases delineating the boundaries between independent contractor and employment relationships can be instructive to joint employment analysis in that "they *elaborate on the nature and extent of control necessary* to establish a common-law employment relationship." 911 F.3d at 1215 (emphasis supplied). *See* n. 4 *supra*.

Along those lines, in *Local 777*, the District of Columbia Circuit held that "*pervasive* control" over the manner and means of job performance was necessary for an employer finding. 603 F.2d at 898, 901-904 (emphasis supplied). The Court in *Browning-Ferris*, in distinguishing *Local 777*, concluded only that it "does not hold either that indirect control is categorically excluded from the matrix of relevant factors, or that direct control of *all* the essential terms and conditions is the *sine qua non* of employer status under the traditional common-law principles of agency." 911 F.3d at 1218-1219 (footnote omitted) (emphasis in original). The Court did *not* take issue with *Local 777*'s holding that "pervasive control" over key employment terms -- of whatever type is cognizable under the common law -- is required to establish a joint employer relationship with all of its resulting responsibilities and liabilities.

The mere "limited and routine" oversight which the Board's *Browning-Ferris* test would find sufficient to show joint employment is contrary to the District of Columbia Circuit's formulations of "the … extent of control necessary to establish" such a relationship. *See Local 777*, 603 F.2d at 904 ("the minor controls, analyzed above, are simply too insubstantial to justify a conclusion that the lessee cab drivers are 'employees.'"). The Third Circuit's *Browning-Ferris* decision -- *upon which the Board majority explicitly grounded its approach* -- likewise underscores that a joint employer relationship exists only "where two or more employers exert *significant*

control over the same employees." *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3rd Cir. 1982) (emphasis supplied).[11]

Accordingly, "pervasive" and "significant" control over key employment terms -- as opposed to only "limited and routine" control -- must exist to create a joint employer relationship. *See also* GC SOP, pp. 18-19. BFI's irregular, inconsistent and negligible interactions with Leadpoint's employees -- even if any of them could be characterized as "control" -- plainly are insufficient to do so.

2. The Board Should Hold That A Sufficient Quantum Of Direct And Immediate Control Is Required To Establish A Joint Employer Relationship And BFI Did Not Exercise It Here

In addition to BFI's lack of "pervasive" and "significant" control of any type furnishing yet another basis for dismissal, still further grounds are BFI's failure to exercise a sufficient quantum of direct and immediate control.

As noted above, the Court held that indirect and reserved control over essential employment terms *could* be recognized by the Board as *relevant* to joint employer analysis under the Act. The Court neither instructed the Board that they *must* be recognized; nor, beyond their relevance, directed how much weight they should be given, either by themselves or in relation to each other.

Looking as the Court does to its independent contractor cases to "elaborate on the nature … of control necessary" to establish common law joint employment, in *Aurora Packing Co.*,

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[11] Grounding pertinent definitions in a requirement of non-routine control is woven into the Act. The "supervisor" definition in Section 2(11) of the Act is "any individual having the authority . . . to hire, transfer, [etc.] if in connection with the foregoing the exercise of such authority is *not merely routine* or clerical in nature, but requires the use of independent judgment." 29 U.S.C. § 152(11) (emphasis supplied). Similarly, Section 2(11) exemplifies an area where analytically the Board has decided to recognize certain evidence (*i.e.*, secondary indicia of supervisory status) as *relevant* but not of *sufficient weight* to establish a particular legal proposition.

supra, the District of Columbia Circuit found that "'*the extent of the actual supervision* exercised by a putative employer over the 'means and manner' of the workers' performance is *the most important element* to be considered in determining whether or not one is dealing with independent contractors or employees.'" 904 F.2d at 76 (quoting *Local 777,* 603 F.2d at 873) (emphasis in original and supplied).

Thus, the Board similarly should hold that direct and immediate control -- especially as to day-to-day supervision of worker performance --is the *most important* control factor in its joint employer analysis. Direct control should be the center of gravity in the Board's test, and a sufficient quantum of such control should be required to be a joint employer under the Act -- even if other forms of control are recognized as relevant.[12] Such an approach reflects the state of the judicially created common law: as the *Browning-Ferris* dissenters note, the majority cites no court decision in which a joint employment relationship was found in the absence of meaningful direct control. 362 NLRB at 1628. For at least the 30 years prior to *Browning-Ferris*, the opposite was true, and there were numerous Board cases in which joint employer status was premised exclusively upon substantial direct control.

As to BFI here, and assessing the nine (9) evidentiary points described by the *Browning-Ferris* dissenters, BFI clearly does not exercise meaningful direct and immediate control over key employment terms of Leadpoint's employees.

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[12] As discussed elsewhere in this position statement, apart from the common law considerations, the Board is free to recognize policy concerns consistent with the Act in fashioning a joint employer test, *e.g.*, the need to have employment concepts align to the protective policies of Section 8(b)(4). Further, a substantial quantum of direct control should be required because of the imprecise boundaries of oversight inherent in any contractor relationship. A reasonable degree of intentionality should be present before a user of services is deemed to have crossed the line into joint employer status, and thereby be visited with a range of new responsibilities under the Act.

Unsurprisingly, the Regional Director, in evaluating the same record as the Board -- including the nine (9) evidentiary points -- concluded that BFI did *not* exercise sufficient direct and immediate control over Leadpoint's employees to jointly employ them.

The Regional Director determined that:

- as to employee discipline [*i.e.*, (2)], "[t]he [e-mail from BFI manager Keck to Leadpoint president Ramirez] language is clear and unambiguous. Keck merely requested that the employees be terminated for creating an unsafe environment in [the] plant. He did not order or direct Leadpoint to terminate the employees." RD-16.

- "[n]othing in the record supports [the] argument that [BFI] controls Leadpoint's employees' daily work functions [*i.e.*, (4)]. While . . . [BFI] operates the speed of the material stream, [it] does not mandate how many Leadpoint employees work on the line, the speed in which the Leadpoint employees work, where they stand on the material stream, or even how they pick material and contaminates off of the material stream. [BFI's] mere ability to change the speed of the material stream, which is based on the quantity of the material alone, does not create a level of control that is sufficiently direct or immediate to warrant a finding of joint control. . . . [It] is not based on individualized assessments of Leadpoint's employees or evidence of control in the manner in which the Leadpoint employees perform their work." RD-17.

- the episodic interactions between BFI supervisors and Leadpoint employees [*i.e.*, (9)] were inconsequential: "[T]he record evidence revealed that these instructions from BFI were either routine or routinely ignored. . . . [T]he record establishes that Leadpoint solely supervises its own employees. In this regard, to the extent that [BFI] has a problem with a Leadpoint employee, [it] complains to a Leadpoint supervisor who takes care of the matter using their own discretion. I further note that to the extent that any [BFI] employee instructed a Leadpoint

employee, the instruction was merely routine in nature and insufficient to warrant a finding that [BFI] jointly controls Leadpoint employees' daily work." RD-17 n. 11, RD-18.

3. The Board's Joint Employer Definition Must Effectuate All Of The Act's Purposes And Cannot Have A Looser Control Formula Than As To Section 8(b)(4)

The Board must adopt a joint employer definition that is consistent with and effectuates *all* of the purposes of the Act. The Act does not define the term "joint employer." Nor does it provide much guidance as to the term "employer" since the statutory definition only explains that the word includes parties "acting as an agent of an employer, directly or indirectly," while excluding certain other parties not relevant here. 29 U.S.C. § 152(2).

As the Act includes only a single "employer" definition to cover all of its purposes, the Board's joint employer concepts must not contradict other provisions of the Act. Because Congress enacted a single, unitary "employer" definition for the NLRA, the same definition must apply throughout the Act. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme.") (citations and internal quotations omitted).

Accordingly, in developing and applying its joint employer standard here, the Board must comport with all of the Act's designs, *e.g.*, including the protections against secondary boycotts Congress intended. The maximalist control approach posited by the Board *Browning-Ferris* majority would wreak havoc with the Act's secondary boycott provisions in Section 8(b)(4)(ii)(B) [29 U.S.C. § 158(b)(4)(ii)(B)]. The Board cannot have a joint employer test which is premised upon a looser control formula than that underlying Section 8(b)(4)'s understanding of "an autonomous and unoffending" employer. *See also* GC SOP, p. 16 (arguing expansive joint

employer definition "is clearly contrary to the Act's object of limiting the spread of economic coercion beyond the entities actually involved in a labor dispute."). Section 8(b)(4) also was enacted by Taft-Hartley (and enhanced by 1959's Landrum-Griffin amendments, Pub. L. 86-257), and its very purpose was to narrow those enterprises that would be found to possess the same primary employer status.

Were the Board *Browning-Ferris* majority's control (and "meaningful bargaining") view to prevail, a union may be permitted to lawfully picket or apply other economic pressure to either or both joint employers as they chose, even though the targeted joint employer may not have *any* meaningful control over the particular matters that the subject of the labor dispute. Such a result would undermine the Act's object of limiting the spread of labor disputes beyond those actually involved in their resolution.

IV. EVEN IF *ARGUENDO* BFI CONTROLS OR CO-DETERMINES CERTAIN EMPLOYMENT TERMS, IT DOES NOT DO SO AS TO TERMS PERMITTING "MEANINGFUL COLLECTIVE BARGAINING"

BFI is not a joint employer based upon the foregoing common law analysis. But even if *arguendo* BFI were found to control or co-determine some employment terms, it does not do so regarding those terms permitting "meaningful collective bargaining" as a joint employer under the Act. The cases should be dismissed for this reason as well.

As the District of Columbia Circuit stressed, its remand has another requirement:

> There is a second half to the Board's new test that bears mention. The Board held that, even if it finds that the common law would deem a business to be a joint employer, the Board will also ask 'whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining' before finding joint-employer status under the Act. *See Browning-Ferris*, 362 N.L.R.B. No. 186, at 2. 'In other words' according to the Board, 'the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status [under the Act].' *Id*. at 12.

> The Board, however, did not meaningfully apply the second step of its test here. … [T]he Board never delineated what terms and conditions are 'essential' to make collective bargaining 'meaningful,' *id*. at 2, instead declaring that it would adhere to an 'inclusive' and 'non-exhaustive' approach to the meaning of 'essential terms and conditions of employment,' *id.* at 15. *Nor did the Board clarify what 'meaningful collective bargaining' might require in an arrangement like this.*
>
> We trust that, if the Board were again to find that Browning-Ferris is a joint employer of the Leadpoint workers under the common law, it would not neglect to (i) apply the second half of its announced test, (ii) explain which terms and conditions are 'essential' to permit 'meaningful collective bargaining,' and (iii) clarify what 'meaningful collective bargaining' entails and how it works in this setting.[13]

Id. at 1221-1222 (emphasis supplied).

A. Because BFI Does Not Control Or Co-Determine Leadpoint Employees' "Wages [And] Hours," As A Matter Of Law It Cannot Engage In "Meaningful Collective Bargaining" Under Section 8(d) Of The Act

Section 8(d), 29 U.S.C. § 158(d), defines what constitutes collective bargaining under the Act: "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages, hours,* and other terms and conditions of employment[.]" (emphasis supplied).

Thus, "wages" and "hours" are the essential mandatory subjects expressly referenced in the Act. To be an "employer" (or a joint employer), a party presumably must have control or co-control over at least those areas to engage in "meaningful collective bargaining." As collective bargaining is understood by the Act, a party must be capable of negotiating as to wages, hours

[13] Accordingly, if the Board finds BFI does not satisfy common law joint employer requirements, it can end its assessment there. If the cases then remain in repose or if review is taken and the Court agrees with the Board's common law control analysis, the cases will be brought to closure. Alternatively, the Board can address the "meaningful collective bargaining" prong of the Court's remand; and, if it so decides, cabin its holding as provisional unless BFI ultimately is determined to have sufficient common law control to be a joint employer.

"*and*" other terms and conditions — not "*or*." Such a textual analysis reflects the Supreme Court's recent approach interpreting the Act in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) at slip op. 12, which focuses on what Congress actually enumerated as the essential core of a legal obligation.

Here, as discussed above, BFI does not control or co-determine either Leadpoint employee wages or hours, much less both. As BFI cannot engage in "meaningful collective bargaining" as a matter of law, the cases also should be dismissed for that reason.[14]

B. The Board May Require That A Putative Joint Employer Control Or Co-Determine A Significant Quantum Of Employment Terms To Have The Ability To Engage In "Meaningful Collective Bargaining"

Having at least co-control over a significant quantum of essential employment terms for collective bargaining mechanisms to apply is wholly consistent with the Act; and, therefore, within the Board's authority to require. The *Browning-Ferris* dissent convincingly highlights that promotion of bargaining stability is an important facet of the Act, and cannot be ignored in delineating what constitutes "meaningful collective bargaining":

> Congress did not mean, however, to blindly expand collective-bargaining obligations whether or not they are appropriate. The Act aims to 'achiev[e] industrial peace by promoting *stable* collective-bargaining relationships.' *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (emphasis added). Indeed, one of the Board's primary responsibilities under the Act is to foster labor relations stability. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ('To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.'); *NLRB v. Appleton Electric Co*., 296

[14] We are unaware of any case in which the Board found a joint employer relationship where a service client such as BFI did not at least co-control employee wages and hours, *i.e.*, actually decide on compensation and working hours for individual employees. Here, the Court noted that Leadpoint exclusively controlled and had the right to control such items for its workers. 911 F.3d at 1202-1203. Counsel for the General Counsel also stresses the paramount importance of control over wages (and benefits). GC SOP, p. 17. As argued above, Section 8(d) of the Act *requires* sufficient control over, at least, both wages and hours of individual employees for "meaningful collective bargaining."

> F.2d 202, 206 (7th Cir. 1961) ('A basic policy of the Act [is] to achieve stability of labor relations.').

362 NLRB at 1635. Elsewhere, as the dissent points out, the Board has found "fragmented bargaining" to constitute evidence of bad faith. *Id.* at 1640 n. 38. Counsel for the General Counsel also emphasizes the importance of fostering bargaining stability as a policy consideration in formulating a joint employer standard. GC SOP, pp. 7, 11.

The Supreme Court similarly is clear that there is a floor below which the theoretical ability to negotiate nonetheless is insufficient under the Act to invoke collective bargaining obligations. *See Denver Building Trades Council*, 341 U.S. at 689–690 ("[T]hat the contractor had some supervision over the subcontractor's work, *did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other*. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.") (emphasis supplied).

The notion that the ability to negotiate over some stray working condition does not create a bargaining obligation under the Act is not new. The Board's former doctrine in *Res-Care*, 280 NLRB 670, 674 (1986) "recognized the existence of a core group of 'basic bargaining subjects,'" and held -- as did the court decisions cited therein -- that lack of "ultimate authority" over those subjects precluded meaningful collective bargaining. In *Res-Care*, the Board found that "if an employer does not have the final say on the entire package of employee compensation, *i.e.*, wages and fringe benefits, meaningful bargaining is not possible." *Id.* (citations omitted). BFI patently does not have "the final say on the entire package of employee compensation" for Leadpoint's employees. *Cf. McClatchy Newspapers, Inc.* 321 NLRB 1386, 1391 n. 22 (1996) ("The paramount importance of wages as a mandatory subject of bargaining is readily demonstrated by its placement at the beginning of the statutory (8(d)) requirement that parties 'confer in good faith with respect

to *wages*, hours, and other terms and conditions of employment.'") (describing wages as "a primary basis for negotiations") (emphasis in original); *TLI, Inc.*, 271 NLRB 798, 799 (1984) (no joint employer relationship when entity did not "control[] the economics of the relationship").

Because, as discussed below, BFI does not control or co-determine a significant quantum of Leadpoint employees' employment terms -- or, indeed, any such terms -- the cases also should be dismissed on this basis.

C. Bargaining Obligations In A Putative Joint Employer Context Must Be Consistent With Section 8(a)(2) Of The Act

In analyzing whether a putative joint employer has a bargaining obligation, the Board must take pains to ensure that Section 8(a)(2) of the Act, 29 U.S.C, § 158(a)(2), is not violated by having employment terms imposed upon unrepresented statutory employees (or minority employee groups) through negotiations open to a lawful exercise of a union's economic weapons. For example, while it is evident that BFI's hours of operation is one of the "routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts," 911 F.3d at 1219, and so not a cognizable control factor, it similarly cannot be an employment term for which bargaining is required. Given the nature of the work BFI contracted for, *i.e.*, in support of BFI's integrated operations, its performance is not divisible from when BFI has decided those operations will be conducted.[15] Accordingly, to avoid the Union from unlawfully binding the interests of any non-unit employees -- even more so if the union represents only a minority of any party's statutory employees at a workplace -- *the Board should hold that a joint employer cannot*

[15] This essentially is the "lawn service" example in Judge Randolph's dissent, 911 F.3d at 1228 n. 11, which the majority was at pains to emphasize does *not* encompass employment terms. *Id.* at 1221 n. 15. *See also id.* at 1221 ("the basic contours of a contracted-for service—such as requiring four lines' worth of sorters plus supporting screen cleaners and housekeepers—would not count under the common law.").

be required to bargain over any subject that is not divisible and limited to the employees the union represents.[16]

D. Based Upon The Record Evidence, BFI Plainly Does Not Control Or Co-Determine Employment Terms Necessary For "Meaningful Collective Bargaining"

Based upon the record evidence -- and subtracting those areas that the Court and the District of Columbia Circuit elsewhere identifies as *not* constituting employment terms, but rather elements of a contracted-for service arrangement -- BFI plainly does not control or co-determine such terms necessary for "meaningful collective bargaining."

Thus, with respect to the essential Section 8(d) subjects -- wages and hours -- BFI does not control or co-determine them for Leadpoint's employees. As the *Browning-Ferris* dissenters emphasize, at most BFI's contract with Leadpoint contains "one contractually-established pay rate ceiling restriction for Leadpoint employees (obviously stemming from the cost-plus nature of the contract)." 362 NLRB at 1634. The Court was clear that cost-plus arrangements are common aspects of contractor relationships themselves and are not employment terms. Leadpoint otherwise retains discretion to set its employees' wages, as well as their benefits and other forms of compensation. Similarly, as to hours, BFI has no control over which Leadpoint employees work particular days, shifts, schedules, or minimum hours. Rather, as the *Browning--Ferris* dissent notes, BFI merely has "control of its own facility's hours and production lines," *id*., which the Court likewise found to comprise part of "the basic contours of a contracted-for service" and are not employment terms for which collective bargaining is required under Section 8(d) (or

[16] Again, the contracting party's own operational hours and parameters -- as opposed to when individual workers are scheduled within those strictures -- are not employment terms subject to mandatory bargaining.

would be compatible here with Section 8(a)(2)). Accordingly, BFI cannot engage in "meaningful collective bargaining" within the ambit of the Act.

Indeed, BFI does not control or co-determine any Leadpoint employment terms at all -- and certainly nothing that could be considered "meaningful." As shown above, Leadpoint has exclusive control of its employees' recruiting, hiring, scheduling, assignments, day-to-day supervision, compensation, discipline, and employment policies. In contrast, the Court and the District of Columbia Circuit elsewhere determined that areas the Board majority erroneously considered to be employment terms are in fact aspects of a contracted-for service arrangement itself.

Matters which categorically are *not* employment terms in a contracted-for service arrangement include:

- "the routine components of a company-to-company contract"
- "routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts"
- "the basic contours of a contracted-for service"
- "set[ting] the objectives, basic ground rules, and expectations for a third-party contractor"
- "constraints imposed by customer demands," "monitor[ing], evaluat[ing], and improv[ing] the results or ends of the worker's performance"
- establishing minimum qualification for a contractor's employees prior to their performance
- tracking contractor productivity, monitoring performance, reviewing contractor records for compliance, and watching over expenses — including headcount and overtime

- regulating work flow
- satisfying government regulations and mandates
- directions and policies generally related to premises safety and managing premises liability/risk to recognized standards of care (*i.e.*, items related to visitors to the premises generally, and not turning upon the employment status of particular individuals)

Supra pp. 3-5 and n. 4.

Reviewing by number the nine (9) incidents of alleged control which the *Browning-Ferris* dissenters found at 362 NLRB 1634 to be the "sum total" of the "evidence relied upon by the majority to find joint employer status in this case," even if established, *none* of them are employment terms for which collective bargaining could be required:

(1) goes to contractor qualifications and maintaining premises safety

(2) employee investigation and disciplinary decisions undertaken by Leadpoint

(3) attendant to a cost-plus arrangement

(4) part of the "basic contours of a contracted-for service"

(5) policing a cost-plus arrangement

(6) goes to "the basic contours of a contracted-for service"

(7) monitoring contract performance

(8) goes to "the basic contours of a contracted-for service;" BFI does not control individual employee assignments

(9) not an employment term reducible to bargaining; BFI is not giving instruction subject to employee discipline

As the *Browning-Ferris* dissenters cogently underscore: "That is all there is[.] … The majority's evidence amounts to a collection of general contract terms or business practices that are

common to most contracting employers … plus a few extremely limited BFI actions that had some routine impact on Leadpoint employees. It would be hard to find any two entities engaged in an arm's-length contractual relationship involving work performed on the client's premises that lack this type of interaction." *Id.* There is nothing which the District of Columbia Circuit would recognize as an employment term as opposed to a facet of a contracted-for relationship itself -- much less a significant quantum of terms susceptible to "meaningful" collective bargaining invoking all of the responsibilities and potential liabilities of Section 8(d) of the Act.

E. If The Board Finds BFI To Be A Joint Employer Capable Of "Meaningful Collective Bargaining," The Board Must (i) Delineate All Of The Terms Over Which BFI Is Expected To Bargain And (ii) Explain How BFI And Leadpoint Can Reallocate Their Respective Control Over Employment Terms Or Potentially Exit A Joint Employer Relationship

BFI is neither a joint employer under the common law nor capable of "meaningful collective bargaining" under the Act. But if it were found by the Board to be such a joint employer subject to a bargaining obligation, the Court's expectation on remand is that the Board would "clarify what 'meaningful collective bargaining' entails and how it works in this setting." 911 F.3d at 1222.

In other words, among other things, the Court would expect the Board to delineate precisely which Leadpoint worker terms BFI allegedly controls or co-determines and is supposed to bargain over. As was argued to the Court, the Board's "plenary, unlimited bargaining order does not even articulate those subjects over which the Board expects Browning-Ferris to negotiate in relation to Leadpoint." BFI Reply Brief, p. 24 (citing BFI Opening Brief, pp. 47-53).

Further, as also was argued to the Court -- and as the Court recognized -- the *Browning-Ferris* decision did not explain fundamental concepts such as: (1) how does a service client bargain to terminate the service contract underlying what the Board found to constitute a joint employer relationship; (2) if the service client and contractor want to change any aspect of their arrangement,

or reallocate between them control/bargaining responsibilities, how do they do so; and (3) how do parties to a service contract then determine whether their reallocation of control has resulted in their exiting a joint employer relationship. *See* BFI Reply Brief, p. 23 n. 17 (citing BFI Opening Brief, pp. 51-53).[17] If BFI were to have a bargaining obligation, all of these basic functional details would need to be explained.

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For the foregoing reasons, and based upon the record evidence, the cases should be dismissed. Please do not hesitate to contact us if the Board has any questions or requires additional information.

Respectfully submitted,

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[17] We presume the Board would adopt an approach with some concepts similar to *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), *i.e.*, providing for limited, expedited bargaining which need not be carried to the point of impasse or agreement prior to imposition of the relevant employer actions. Ending a service arrangement only would be subject to effects bargaining.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 22, 2019, a copy of the foregoing BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.'S STATEMENT OF POSITION IN RESPONSE TO THE REMAND OF THE DISTRICT OF COLUMBIA CIRCUIT in Case 32-CA-160759 was served by electronic mail on the following case participants:

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